

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
July 13, 2006 Session

**TINA KIRCHNER KAUFFMAN v. CHRISTIAN ANDREW MONTZ**

**A Direct Appeal from the Circuit Court for Davidson County  
No. 98D-78     The Honorable Carol Soloman, Judge**

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**No. M2003-00448-COA-R3-CV - Filed on August 14, 2006**

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This is a post-divorce, child custody case. The order appealed was filed in the trial court January 10, 2005. Mother/Appellant filed her notice of appeal on February 9, 2005, which was timely. On February 10, 2005, thirty one days following the entry of the final judgment in the case, Father/Appellee filed a Tenn.R.Civ.P. 60.02 motion, and on May 11, 2005, filed an amended Rule 60.02 motion. Primarily, the motion and the amended motion rely upon post-judgment facts, but in effect seek an amendment of the trial court's January 10, 2005 order. By order filed July 29, 2005 and amended order filed August 19, 2005, the trial court ruled upon Father's Rule 60.02 motion. Because the case was in this Court on appeal, the trial court had no jurisdiction to entertain the Rule 60.02 motion without a remand from this Court. Therefore, the trial court's order and amended order on the Rule 60.02 motion are vacated. The issues presented on appeal by Mother/Appellant are matters ruled on by the trial court on the Rule 60.02 motion. Therefore, there are no issues that are from the appealed order, and the order appealed is affirmed as modified.

**Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Circuit Court Affirmed as Modified**

W. FRANK CRAWFORD, P.J., W.S., delivered the opinion of the court, in which ALAN E. HIGHERS, J. and DAVID R. FARMER, J., joined.

David H. Hornik of Nashville, Tennessee for Appellant, Tina Kirchner Kauffman

Stephanie Hatchett of Nashville, Tennessee for Appellee, Christian Andrew Montz

**OPINION**

Tina Kirchner Kauffman ("Mother," or "Appellant") and Christian Andrew Montz ("Father," or "Appellee") are the parents of a minor child, Alexis Viktoria Montz (d.o.b. 09-21-95). On November 17, 1998, the parties were divorced by Final Decree of the Circuit Court for Davidson County, Tennessee. As part of the final order in the divorce matter, the court also entered a

Permanent Parenting Plan, which awarded primary residential custody to Ms. Kauffman. Mr. Montz was ordered to pay child support, by wage assignment, in the amount of \$355 per month.

Subsequently, the parties engaged in a seemingly endless array of procedural maneuvers in the circuit court and also in the juvenile court. On or about October 13, 2001, Mr. Montz filed a “Petition for Emergency Restraining Order and Custody”(the “Abuse and Neglect Petition”), in the Juvenile Court for Davidson County. In the Abuse and Neglect Petition, Mr. Montz alleged abuse and neglect of the child by Ms. Kauffman on the grounds of domestic abuse and violence in the home [directed toward Ms. Kauffman and not toward the child]. Mr. Montz sought immediate removal of the child from Ms. Kauffman’s care, requested a guardian ad litem be appointed for the child, asked that Mr. Montz’s child support obligation be suspended, and that the court ultimately grant Mr. Montz full custody of the child. While the Abuse and Neglect Petition was pending, on May 16, 2002, Ms. Kauffman filed a Petition for Contempt against Mr. Montz in the Circuit Court for Davidson County, alleging that Mr. Montz had failed to pay child support. On July 2, 2002, Mr. Montz filed a motion seeking a stay of any further proceedings on the Petition for Contempt until after the Abuse and Neglect Petition was resolved in the Juvenile Court. The Circuit Court granted the stay pending the outcome of the Juvenile Court proceedings. On July 3, 2002, Ms. Kauffman filed a Response to Mr. Montz’s Abuse and Neglect Petition alleging that the Juvenile Court had no jurisdiction in the case. Specifically, Ms. Kauffman argued that there had been no finding by the Juvenile Court that the minor child was dependent and neglected within the meaning of the law,<sup>1</sup> although a dependency and neglect hearing had been scheduled for August 1, 2002.

On August 1, 2002, the Juvenile Court Referee entered a “Family Services Order,” in which the Referee found that Mr. Montz’s allegations in the Abuse and Neglect Petition were not supported by the evidence and that jurisdiction should be returned to the Circuit Court.<sup>2</sup> Mr. Montz appealed from this ruling and petitioned for a *de novo* hearing before the Juvenile Court Judge. Before the requested hearing could take place, on November 11, 2002, Mr. Montz filed an “Amended Petition” in the Juvenile Court. In addition to the domestic violence allegations, the Amended Petition asserts, as additional grounds for the removal of the minor child from Ms. Kauffman’s custody, that the minor child had been exposed to drug abuse and criminal activity involving drugs at Ms. Kauffman’s home. The Amended Petition was tried before the Juvenile Court Judge on May 2<sup>nd</sup> and July 26<sup>th</sup>, 2003. By Order of April 27, 2004, the Juvenile Court restored custody of the minor child to Ms. Kauffman, ordered that Ms. Kauffman complete an alcohol and drug assessment, and granted Mr. Montz visitation. The Order of the Juvenile Court was appealed to the Circuit Court for Davidson County; however, Mr. Montz voluntarily dismissed this appeal and, on March 12, 2004, filed a Petition for Change of Custody in the Circuit Court for Davidson County, in which Mr. Montz re-asserted the allegations of domestic abuse, drug and alcohol abuse, and pending criminal charges

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<sup>1</sup> At this point, the Juvenile Court had entered a Family Services Interim Order changing custody of the child to joint custody during the pendency of the proceedings in Juvenile Court.

<sup>2</sup> This “Family Services Order” indicates that a guardian ad litem had been appointed to represent the minor child, and that the guardian ad litem was present during the hearing.

against Ms. Kauffman. On April 12, 2004, the trial court entered an order consolidating Ms. Kauffman's Petition for Contempt and Mr. Montz's Petition for Change of Custody. The matter was heard by the trial court on November 1, 2004. On January 10, 2005, the trial court entered an order finding that substantial and material changes had occurred since the entry of the prior parenting plan. The trial court granted Mr. Montz's Petition for Change of Custody. The January 10, 2005 Order reads, in pertinent part, as follows:

...[T]he Court FINDS:

That there has been a significant or material change in circumstances since the divorce was originally heard...and the original Parenting Plan was approved. At that time, the parties shared joint custody with the Mother being the primary residential parent, although the Father shared nearly equal parenting time with the Mother....

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The Father has shown by clear and convincing evidence that the Mother's lifestyle and habits have changed dramatically.... According to the proof before the Court, the Mother has engaged in activities while shopping with the minor child which led to her arrest for shoplifting. She is currently under indictment for several charges....

The Mother has chosen to invoke her Fifth Amendment rights....There is compelling extrinsic evidence to find that her conduct would give rise to suspicion of shoplifting activities. Even more dismaying to the Court, there is evidence that the Mother has forced the minor child...to participate in these activities.

The Court heard credible testimony that the Mother has been arrested in the child's presence on at least one occasion, and held for questioning by store detectives in the child's presence on at least two other occasions. The Court FINDS that it is entirely inappropriate and inexcusable for the Mother to conduct herself in such a way that she is arrested, handcuffed and placed in a police cruiser while the child is present and watching.

The Father has presented ample evidence that the Mother was engaged in drug-seeking activities for narcotics from numerous pharmacies....

The Court has heard proof that the Mother over-indulges in alcohol in the child's presence. The proof showed that at times, the Mother and her current husband would sometimes be involved in slapping and pushing episodes in front of the minor child....

All of these activities represent a substantial change of circumstances in the Mother's home and lifestyle upon which the Court can entertain a petition for change of custody.

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#### MOTHERS PETITION FOR CONTEMPT

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The Court hereby immediately terminates the Father's obligation to pay child support.... His total obligation was \$14,910.00. The Court finds that his total payments to Mother were \$14,847.16; he therefore owes the Mother the sum of \$62.14 in full satisfaction of his child support obligation. The Court declines to find that the Father is in deliberate or willful contempt, having paid substantially all of the support due while the child was in Mother's custody.

#### CHILD SUPPORT, HEALTH INSURANCE AND VISITATION

The Mother's periods of custody with Alexis should be timed to coincide with her stepsister, Rachel Kauffman's, visits with the Mother's current husband when possible. The Mother shall have the child on alternate weekends, from 7:00 p.m. CST on Friday evening until 5:00 p.m. CST on Sunday evening, with the exchange to occur at the Community gas station located at the I-75 and I-24 junction.

The child shall spend Thanksgiving with the Mother from 3:00 p.m. on the day before Thanksgiving until Sunday at 6:00 p.m. CST, at which time the parties will meet at the exchange location set out above.

The child will spend Christmas with the Father until December 27<sup>th</sup> at 6:00 p.m., and shall be returned by the Mother at 6:00 p.m. CST to the Father on the evening prior to the beginning of school following the Christmas break.

The Mother will have Spring Break, 2005 with the child, and successive odd years, with the Father having even years. The parties will execute an abbreviated Parenting Plan for holiday visitation which the Court will approve upon submission, it being the Court's intent that the holidays will rotate from year to year. If the parties are unable to agree on the holiday rotation, either party may file a motion with the Court to address this issue.

The Mother shall pay the Father the sum of \$306.00 per month as child support for Alexis' care and well-being. In addition, the Mother will reimburse the Father for the child's portion of his health care premiums each month....

The Parental Bill of Rights will be followed by both parents, especially in regard to the prohibition of making any derogatory remarks about the other parent....

Due to the evidence before the Court, the Mother is ordered to submit to a drug test through the court system or Sheriff's office within twenty-four hours after the child's return on the second weekend visit each month. Such testing shall continue for one year.

The Mother is prohibited from taking the child shopping during her visitation.

#### COURT COSTS AND ATTORNEY FEES

The Court finds that the Father is entitled to an award of attorney fees in the sum of \$8,000.00 for the necessity of bringing this well-founded petition, the granting of which is in the child's best interests. However, because the Court believes the Mother is unable to pay this sum, the Father's request for fees is respectfully denied.....

Ms. Kauffman filed a Notice of Appeal from this Order on February 9, 2005. On February 10, 2005, Mr. Montz filed a "Rule 60 Motion to Alter or Amend the Final Order" of the trial court entered on January 10, 2005.<sup>3</sup> The Rule 60 Motion asserts, *inter alia*, that Ms. Kauffman was arrested on new charges of shoplifting on January 29, 2005. Ms. Kauffman filed a Response to the Rule 60 Motion on February 25, 2005. Mr. Montz filed an "Amended Rule 60

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<sup>3</sup> Although this motion is styled "Rule 60 Motion to Alter or Amend," because it was filed 31 days after the entry of the January 10, 2005 Order, it is not a Tenn. R. Civ. P. 59.04 motion to alter or amend. Rather, it is a Tenn. R. Civ. P. 60.02 motion to set aside a judgment.

Motion to Alter or Amend Final Order” on May 11, 2005. The Amended Motion reads, in relevant part, as follows:

...The Father specifically requests an order to suspend or modify the Mother’s visitation with the minor child.... The Father also moves the Court to amend its final order as to attorney fees. For cause, the Father would amend his motion to show as follows:

1. After the new shoplifting charges (incurred shortly after the order was entered), the Mother apparently failed to appear in criminal court. A capias was apparently issued for her arrest shortly before one of her periods of visitation with the child.
2. The Mother has pleaded guilty to various criminal charges, including those related to unauthorized possession of controlled substances since the final hearing. The Mother’s sentencing hearing is set on May 12, 2005. If the Mother receives a prison sentence, the Father asks that the order in regard to her visitation rights and periods of custody be reviewed and amended accordingly.
3. The Father asks the Court to review and reverse its decision in denying his right to recover attorney fees....

Mr. Montz’s Rule 60 Motion was heard by the trial court on June 10, 2005. On July 29, 2005, the trial court entered its Order granting Mr. Montz’s Rule 60 Motion, which Order was amended on August 9, 2005. The Amended Order reads, in pertinent part, as follows:

This cause came to be heard on the 10<sup>th</sup> day of June, 2005, upon Father’s Rule 60 request to modify or amend the Court’s final ruling after trial in this matter. Based upon the Mother’s guilty plea in the criminal court shortly after the trial of this matter, along with the Mother’s current incarceration, the Court finds that the Father’s motion is well taken.

Because of the Mother’s aberrant behavior, continuing immediately after the hearing, the Court believes that she is unable to have appropriate visits with the child. The Court also believes [i]t is in the child’s best interest that no visitation occur with her mother during the time of her incarceration. If the Father believes the child is actually suffering emotional distress by not seeing the Mother, he may arrange for her to have a short visit, which is entirely at his discretion. The Father may monitor the child’s mail or calls from her mother, due to the unusual circumstances involved in this case.

In June, 2004, the Father requested attorney fees....

The Court finds that due to the Mother's insistence of innocence until her guilty plea, the Father was forced to expend much of his time and financial resources in legal proceedings that could have been avoided.... The Mother's counsel argues that she has insufficient funds or realty equity to satisfy any potential judgment. However, the Court finds that the statute does entitle the prevailing party to recover legal costs, not based on ability of parent to pay same.

During the pendency of the civil litigation in this case, Ms. Kauffman was indicted on multiple felony counts of theft [embezzlement] from her former employer [a dental clinic], and on charges that she had illegally obtained hydrocodone, a controlled substance, by using her position at the dental clinic to call in fraudulent prescriptions. During this time, Ms. Kauffman was also arrested on several occasions for shoplifting. Between the entry of the Order of January 10, 2005 and the ruling of the trial court on Mr. Montz's Rule 60 Motion, on March 29, 2005, Ms. Kauffman entered into a plea agreement in the Davidson County Criminal Court. The plea agreement was to two felony counts, embezzlement [a Class C Felony], obtaining prescription drugs by fraud [a Class D Felony], and shoplifting merchandise less than \$500 in value [a Class A misdemeanor]. Ms. Kauffman received a three year sentence for each felony count and eleven months twenty-nine days on the shoplifting charge, all of which is to be served concurrently for a total effective sentence of three years. Ms. Kauffman began serving her sentence on May 12, 2005, and remains incarcerated, at the Davidson County Correctional Facility for Women, at the time of this appeal.

Ms. Kauffman appeals and raises three issues for review as stated in her brief:

- I. Did the trial court abuse its discretion by limiting mother's [Appellant's] visitation with the parties' minor child while incarcerated to such times as the Appellee, in his sole discretion may deem appropriate.
- II. Did the trial court abuse its discretion by permitting Appellee to censor the child's mail and telephone calls with her mother, the Appellant herein, in direct contravention of the provisions of T.C.A. § 36-6-101(a)(3)(A)-(a)(3)(F).
- III. Did the trial court abuse its discretion by awarding Appellee attorney fees in this cause.

Mr. Montz raises the additional issue of whether this Court has jurisdiction over this appeal due to the fact that Ms. Kauffman's Notice of Appeal was filed one day prior to the entry of the

January 10, 2005 Order. This issue is without merit because the record clearly shows that the notice of appeal was filed February 9, 2005, although a premature notice of appeal is sufficient. *See* Tenn.R.App.P. 4(d).

As noted above, Mr. Montz filed a Tenn. R. Civ. P. Rule 60.02 motion on February 10, 2005, which was more than 30 days after the entry of the final order filed January 10, 2005. No application was made by Mr. Montz to remand the case to the trial court for consideration of the Rule 60.02 motion. In *Spence v. Allstate Ins. Co.*, 883 S.W.2d 586 (Tenn. 1994), our Supreme Court held:

[W]e hold that a trial court has no jurisdiction to consider a Rule 60.02 motion during the pendency of an appeal. If a party wishes to seek relief from the judgment during the pendency of an appeal, he should apply to the appellate court for an order of remand.

*Id.* at 596.

Consequently, the trial court lacked jurisdiction to hear the Tenn. R. Civ. P. 60.02 motion. Therefore, we vacate the trial court's Order of July 29, 2005 and the Amended Order of August 9, 2005. We further note that the issues raised by Ms. Kauffman in her appeal are all issues that were ruled on in the trial court's order(s) on the Tenn. R. Civ. P. 60.02 motion. In short, she has presented no issues arising from the January 10, 2005 Order, from which she specifically appeals. We note, however, that the trial court set a visitation schedule for Ms. Kauffmann and also ordered her to submit to periodic drug tests. It is conceded by the parties that Ms. Kauffman is presently incarcerated, and the above provisions of the trial court's order cannot be effectuated. Accordingly, the trial court's order is modified to eliminate the visitation schedule and the provision for drug tests.

For the foregoing reasons, we vacate the trial court's orders of July 29, 2005 and August 9, 2005. The trial court's order filed January 10, 2005, as modified herein, is affirmed. We remand this case for such further proceedings as necessary, including a hearing on visitation. We note, however, that any order on visitation should be made by the trial court and should not be contingent upon the discretion of either party. Costs of appeal are assessed one-half to the Appellant, Tina Kirchner Kauffman and her surety, and one-half to the Appellee, Christian Andrew Montz.

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W. FRANK CRAWFORD, PRESIDING JUDGE, W.S.